

Uneasy Partners: Russia and the European Court of Human Rights

By William E. Pomeranz*

Russia has experienced a turbulent relationship with the European Court of Human Rights (ECtHR) ever since it joined the Council of Europe in 1996. Russian citizens have overloaded the system with petitions, and the ECtHR frequently has chided the Russian state for failing to address the underlying conditions that lead to these recurring human rights violations. At the same time, the 1993 Russian Constitution remains remarkably open to international law, and ECtHR decisions have been repeatedly cited by Russia's highest constitutional tribunal — the Constitutional Court — in its determinations dealing with civil and social rights.

In 2011, however, the relationship between these two judicial bodies suffered a serious breach as a result of the ECtHR's contentious ruling in the case involving the Russian serviceman Konstantin Markin. For the first time, the ECtHR essentially overruled a decision by the Russian Constitutional Court, thereby provoking a storm of protest from Russia's leading jurists and politicians. Given that the ECtHR's effectiveness is predicated on a surrender of national sovereignty and the willingness of member states to abide by international court decisions, a residual amount of stress is inevitable between the court and its members. But while Russia may not be alone on this front, its relations with the ECtHR nevertheless appear to be under almost permanent strain.

This article will take an in-depth look at the Markin case and how the question of parental leave nearly drove a permanent wedge between Russia and the ECtHR. Yet as this analysis demonstrates, for all the controversy that accompanied the Markin decision, the overall debate was tempered by a mutual recognition that the substantive legal interactions between Russia and the ECtHR have been, on the whole, productive. Therefore, this article will explore why — despite the simmering tensions and the occasional eruption — Russia continues to subject itself to the ECtHR's jurisdiction.

THE MARKIN CASE

Konstantin Markin seems like an unlikely person to incite a major constitutional crisis. A radio intelligence operator in the Russian military and recently divorced father of three, Markin sought three years parental leave from the army to take care of his young children (including an infant). By law, such a right is legally owed to servicewomen, but a Russian military court determined that servicemen were entitled to only three months of leave. Markin pursued multiple appeals, ultimately reaching the Russian Constitutional Court. The Constitutional Court, however, proved less than sympathetic to Markin's request; it concluded that Markin was not entitled to such an extended leave, in part because by signing up for military service, he had implicitly agreed to certain limitations to his civil rights and freedoms.¹ The Court also pointed to the special social role assigned to motherhood (but evidently not fatherhood) set forth in Article 38(1) of the Russian Constitution, which states that: "Motherhood and childhood, and the family shall be under state protection."²

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Markin's legal options were not exhausted, however, even after Russia's highest constitutional tribunal rejected his appeal. Instead, Markin took advantage of an opportunity that tens of thousands of his fellow citizens have pursued since Russia joined the Council of Europe in 1996 — the right to file a complaint with the European Court of Human Rights in Strasbourg. The ECtHR has provided an important check on the Russian legal system; it has called for "general" changes to Russian law to secure basic civil rights and freedoms, as well as imposed significant financial penalties on the Russian state for individual

violations of human rights. While Russia generally has a good record of paying the fines, it has not been responsive in addressing the ECtHR's demand to reform the underlying deficiencies within the Russian legal system.³

So Markin turned to the ECtHR, specifically arguing that the Russian Federation had violated Article 14 of the European Convention of Human Rights. This provision declares that the rights set forth in the Convention shall be "secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin,

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association with a national minority, property, birth or other status.”⁴ The ECtHR further considered this non-discrimination clause in conjunction with Article 8 of the Convention, which states that “everyone has the right to respect for his private and family life, his home and correspondence,” and forbids public interference by a public authority with the exercise of this right.⁵

Thus, the ECtHR elevated a social right — the right to parental leave — to a broader question of civil rights regarding equal treatment of the sexes. The ECtHR dismissed the Russian Constitutional Court’s special treatment of “motherhood.” While recognizing the differences between a mother and a father, the ECtHR stated, “[A]s far as taking care of the child during this period [infancy] is concerned, both parents are ‘similarly placed.’”⁶ Moreover, the ECtHR rejected the Constitutional Court’s claim that the taking of parental leave by servicemen would somehow have a negative impact on the fighting power of the Russian armed forces.⁷ It concluded that the Russian Constitutional Court had failed to provide sufficient justifications for imposing much stronger restrictions on the family life of servicemen than on servicewomen,⁸ and called on the Russian state to take the “appropriate general and/or individual measures to secure the right of the applicant.”⁹ Markin himself was not awarded any pecuniary damages, in part because the Russian state had allowed him to take substantial parental leave during the course of this dispute and had even paid financial aid to Markin on an exceptional basis.¹⁰ Markin did receive a small award for costs and expenses, but it was broader legal principle — and the perceived attack on the integrity of the Russian legal system — that opened up the rift between the Constitutional Court and the ECtHR.

RUSSIA RESPONDS

On the surface, the ECtHR has issued far more controversial decisions against the Russian state than the Markin verdict. Through a series of rulings, the ECtHR has put a glaring spotlight on Russia’s massive human rights abuses in Chechnya.¹¹ In September 2011, the ECtHR issued a split ruling in the complaint filed by Yukos shareholders that, while rejecting a political motivation behind the Russian state’s prosecution of the company, nevertheless found that the company’s right to a fair trial had been violated.¹² This determination may yet end up costing the Russian government significant damages. The ECtHR also ruled against Vladimir Putin’s tightly controlled political system by declaring in April 2011 that Russia’s law on political parties was

draconian and in violation of Article 11 of the European Convention (freedom of association).¹³

And yet, despite losing several high-profile cases, it was the Markin decision that seemingly provoked the greatest indignation among Russia’s judicial and political elite. The Markin ruling reverberated primarily because it represented the first time that the ECtHR had essentially overridden a Russian Constitutional Court determination. Russian citizens can file a petition with Strasbourg when a decision becomes “final” under Russian law. For procedural reasons beyond the scope of this article, this moment presently occurs at the cassation (broadly speaking, the final appellate) level, not after a decision by one of Russia’s three “supreme” courts.¹⁴ Thus, rather than necessarily reviewing Constitutional Court decisions, ECtHR rulings mainly have responded to deficiencies within the Russian legal system (for example, the inability to enforce decisions), or otherwise addressed violations of individual rights by Russian law enforcement or other parts of the Russian bureaucracy.

The Markin ruling raised the legal stakes in the ECtHR’s relationship with Russia by openly disputing a Constitutional Court determination. Not surprisingly, this action roused the displeasure of the Constitutional Court’s longstanding chairman, Valerii Zorkin. Zorkin is well-known for making extra-judicial statements and engaging in public debate to a degree that would be unthinkable to a U.S. Supreme Court chief justice. In this instance, although Zorkin warned against over-politicizing the ECtHR’s action, he nevertheless insisted that

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The European Court of Human Rights in Strasbourg.

the decision showed a lack of respect for Russia's legislators as well as represented a fundamental challenge to Russia's national sovereignty.¹⁵

Zorkin further objected to the ECtHR's actions on legal grounds. His argument focused on Article 15(4) of the Russian Constitution, which recognizes international treaties as an "integral part of the Russian legal system" and serves as the main conduit by which ECtHR decisions enter Russian law. Zorkin conceded that in those instances where an international treaty establishes rules other than those "provided by the law," the rules of the international treaty would apply. Zorkin argued, however, that this analytical framework only applied to conflicts between international treaties and Russian laws, not between international agreements and the Russian Constitution itself. As a result, while the European Convention remained an integral part of the Russian legal system pursuant to Article 15(4), it was not, according to Zorkin, higher than the Russian Constitution. In other words, the Russian Constitutional Court's interpretation of the Constitution could not be trumped by an alternative explanation of the European Convention by the ECtHR.¹⁶

Zorkin's assertion of the supremacy of the constitution within Russia's hierarchy of laws — and the Constitutional Court's singular right to interpret the constitution — was quickly seconded by Russian President Dmitrii Medvedev, who issued a sweeping statement that "we will never surrender that part of our sovereignty, which would allow any international court or any foreign court to render a decision, changing our national legislation."¹⁷ Aleksandr Torshin, then acting chairman of the Federation Council, the upper house of Russia's legislature, went so far as to propose legislation to consolidate the Constitutional Court's position vis-à-vis the ECtHR. Under this draft law, any decision by an "interstate organ" would only be fulfilled if the Russian Constitutional Court confirmed that the norms called into question did not correspond with the Russian Constitution.¹⁸ In effect, under Torshin's proposal, the Constitutional Court would essentially exercise veto power over the ECtHR.

Torshin's draft legislation triggered an immediate reaction from the Russian human rights community, which accused the Russian government of breaching its underlying commitment to the European Convention.¹⁹ Critics further cited the bill as a violation of the Russian Constitution's recognition of international law as an integral part of Russian law.²⁰ Judge Anatolii Kovler, Russia's representative on the ECtHR, reported that Torshin's initiative had created unease among the court's leadership in Strasbourg.²¹ Finally, the secretariat of the Constitutional Court weighed in with its own analysis of the proposal, highlighting several procedural irregularities.²² It appears that

this combination of political and technical considerations led to the draft legislation's withdrawal in July 2011.²³

RUSSIA'S UNEASY RELATIONSHIP WITH THE ECtHR

The controversy surrounding Torshin's proposal represents just one in a series of ongoing disputes between Moscow and Strasbourg. In reality, Russia has tested the ECtHR's patience on several occasions since its accession to the Council of Europe in 1996. From the beginning, the Council of Europe recognized that Russia lacked many of the fundamental legal protections required for the basic defense of human rights; nevertheless, Russia was still admitted as a member based on the optimistic proposition that "integration is better than isolation; cooperation is better than confrontation."²⁴

These high hopes, however, have not necessarily been realized in practice. As previously noted, Russians quickly distinguished themselves by filing the largest number of petitions to the ECtHR, in the process exposing the magnitude of the human rights abuses within the country.²⁵ When Russia failed to address the underlying conditions that led to many repeat petitions on the same problem (the non-enforcement of domestic court decisions), the ECtHR issued a pilot judgment against Russia. This procedure, specifically established by the ECtHR to deal with large groups of identical cases, called on Russia to establish an effective domestic remedy to address the non-enforcement (or delayed enforcement) of domestic judgments.²⁶ The ECtHR also reacted to the surfeit of Russian petitions by introducing new expedited review procedures through Protocol 14. Russia dragged its feet on ratifying this Protocol, to the growing frustration of the other member states. Russia only approved Protocol 14 after the other 46 member countries agreed to introduce the expedited review process through an alternative procedure (Protocol 14-bis), thereby highlighting Russia's intransigence and seeming unwillingness to resolve a problem primarily of its own making.²⁷

The Markin case, therefore, represents one of a series of confrontations that have raised serious questions about Russia's future commitment to the court. Yet for all this tension — and the apparent opportunities for Russia to abandon the court altogether — Russia nevertheless has made a conscious decision to remain a member. No doubt a dramatic exit from the ECtHR would have significant political and symbolic consequences for Russia; how could Russia maintain its standing in Europe if it deliberately removed itself from the Council of Europe's judicial institutions? On a more practical note, the Constitutional Court would lose a critical partner and legal pillar if Russia precipitously withdrew from the ECtHR's jurisdiction. Indeed, Zorkin later backpedaled from his strong statements objecting to the ECtHR's interference in Russian affairs. In the past few

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years, Zorkin stated, the Constitutional Court had been accused of ignoring or otherwise devaluing the decisions of the ECtHR. Zorkin rejected such charges; we never said, he argued, “that it was not necessary to fulfill the decisions of the European Court. We only disagreed with those who view the legal position of the European Court as orders requiring changes in Russian legislation, which must be unconditionally fulfilled.”²⁸ “Without knowledge of the actual Strasbourg decisions,” Zorkin emphasized in another interview, “the realization of justice in Russia now is impossible.”²⁹

The Russian Constitutional Court, in fact, has played an essential role in the integration of the European Convention — and ECtHR decisions — into Russian law. Zorkin himself claimed that more than 50 Constitutional Court decisions have been based on positions of the ECtHR, with profound consequences for Russian law and the Russian legal system.³⁰ It was the Russian Constitutional Court, for example, that demanded that the Civil Procedure Code be brought into agreement with Russia’s other procedural codes, thereby recognizing ECtHR decisions as a “newly discovered circumstance” that allowed for the re-opening of civil cases.³¹ The Constitutional Court also relied on the Convention and ECtHR decisions to call for fundamental changes in Russia’s archaic system of supervisory review (*nadzor*) and the introduction of a more transparent appellate process.³² Thus, without minimizing the disagreements between the two bodies, the ECtHR has provided the initial impetus — and de facto precedent — for several major Constitutional Court rulings.

THE QUESTION OF NATIONAL SOVEREIGNTY

That Russia should find itself at loggerheads with the ECtHR is, in many ways, not surprising in light of the experience of other member states. Several countries have challenged the ECtHR’s authority after finding themselves on the losing side of a Strasbourg decision. In one of the most well-known examples, the German Constitutional Court concluded in the *Görgülü* case³³ that while the European Convention enjoyed the status of federal law, administrative bodies and courts could not free themselves from German constitutional and statutory requirements merely by relying on ECtHR decisions. As a result, the German Constitutional Court called on domestic courts to take ECtHR decisions “into account” when interpreting fundamental rights and constitutional guarantees, as opposed to necessarily being bound by such rulings.³⁴

Other cases have provoked even greater controversy. The ECtHR and Italy conducted a protracted debate over the placement of crucifixes in state classrooms.³⁵ Meanwhile, the

United Kingdom remains at odds with Strasbourg regarding how to implement the ECtHR’s decision granting prisoners the right to vote.³⁶ Indeed, Prime Minister David Cameron voiced his frustration with Strasbourg during his address to the Council of Europe on January 25, 2012. While congratulating the ECtHR for its many successes, Cameron nevertheless warned that Strasbourg had become the court of fourth instance, giving an “extra bite of the cherry to anyone dissatisfied with a domestic ruling.”³⁷ He added that decisions made at the national level should be “treated with respect,” and that “when controversial rulings overshadow the good and patient long-term work that has been done, that not only fails to do justice to the work of the Court, it has a corrosive effect on people’s support for human rights.”³⁸



Valerii Zorkin (L), Russian Chairman of the Russian Constitutional Court, and Russian President Vladimir Putin.

Russia clearly lacks the human rights record of other European nations that would allow it to rebuke the ECtHR for undue interference with its domestic enforcement of civil and social rights. Yet an inherent tension invariably is part of the relationship between the ECtHR and its member states, a fact acknowledged by the court itself. In an October 2011 speech in Moscow on the occasion of the Russian Constitutional Court’s 20th anniversary, the outgoing chairman of the ECtHR Jean-Paul Costa recognized that although disagreements existed between the two judicial bodies, “our courts have a common aim.”³⁹ Costa proceeded to add that while it was impossible to limit the number of conflicts, it was “important to preserve a permanent dialogue.”⁴⁰ Such conciliatory remarks suggested that even the Markin case would not cause a permanent rupture in relations between the ECtHR and the Russian Federation, as many feared.

THE DEFENSE OF SOCIAL RIGHTS IN RUSSIA

The controversy surrounding the Markin case already has had repercussions within the Russian legal system. Most notably, when subsequently confronted with another discrimination case involving parental leave, the Constitutional Court came down squarely on the side of gender equality. Alexei Ostaev, the father of three children (including a disabled child and a child under 3) was the sole bread-winner in his family when he was abruptly fired in 2010 from his private-sector job as part of a company-wide staff reduction. Under the Russian labor code (Article 261), a woman finding herself in Ostaev’s position could not be dismissed from her job. Ostaev demanded similar protections, and the Constitutional Court ultimately agreed that he was entitled to the same right to employment in such circumstances. According to the Constitutional Court, the equal rights and duties of parents for the upbringing of their children required the state to take all possible measures to ensure that both parents exercised the same responsibilities in the upbringing of their children.⁴¹

The Ostaev ruling contained no direct citation to the Markin case, so one can only speculate to what extent the Constitutional Court tacitly used this decision to close the gap between itself and the ECtHR on the question of gender discrimination.⁴² On a broader level, these two disputes shed important light on Russia's ongoing legal struggle for the protection of social rights. Article 7(1) of the Russian Constitution proudly proclaims that Russia is a social state,⁴³ and public opinion polls consistently show that citizens value these social rights over other civil and property rights.⁴⁴ Such tendencies were further supported in this year's ombudsman's report on human rights, where every fourth complaint involved a violation of social rights.⁴⁵

Russia's legal battle for social rights is often overlooked in the western literature on Russian law; indeed, especially from a U.S. perspective, the elevation of such rights as constitutional rights is often perceived as overly problematic, particularly in terms of implementation and economic costs.⁴⁶ This may well be true, but as this article demonstrates, Russians are actively engaged in the legal defense of these social rights, and plaintiffs have achieved some notable victories through the courts (although enforcement remains a challenge). In the aftermath of recent elections, the primary focus of Russia's human rights



Former Acting Chairman of the Federation Council Aleksandr Torshin.

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debate will be on the demand for political and civil rights. The realization of social rights, however, represents an important but largely disregarded second front in the fight for human rights in Russia, and the ECtHR remains a direct — and indirect — participant in this struggle.

CONCLUSION: BACK FROM THE BRINK

The Markin case ended quietly, without the public acrimony that had characterized most of the process. Russia appealed the original decision to the Grand Chamber of the ECtHR, which heard arguments in June 2011. The Grand Chamber issued the final verdict on March 22, 2012, where it upheld the original decision and increased Markin's

total award to 6,150 Euros.⁴⁷ Yet this decision did not spark another round of controversy, in part, according to Russia's representative at the ECtHR, because the Chamber toned down the polemics and concentrated on the facts.⁴⁸ The Chamber further did not formally recommend a change in Russian law, although Markin's lawyer insisted that new legislation was still required to fulfill the court's ruling.⁴⁹

Therefore, it appears that Russia once again has backed away from the edge in its uneasy relationship with the ECtHR. By its very mandate, the ECtHR intrudes on the national sovereignty of its members, and Russia is by no means unique among member states in reacting to what it perceives as direct interference in domestic affairs. This inherent tension will not go away any time soon, especially in light of Russia's poor human rights record. Other storm clouds appear on the horizon as well, such as the recent raft of anti-gay legislation in Russia as well as Putin's new NGO and anti-protest laws.⁵⁰ Nevertheless, dialogue has to date prevailed over confrontation in Russia's interactions with the ECtHR, with considerable benefits for individual Russian citizens, the Russian legal system, and the ongoing fight for human rights in the Russian Federation.

Endnotes: Uneasy Partners: Russia and the European Court of Human Rights

¹ Opređenje Konst. Sud RF "ob otkaze v priniatii k rassmotreniiu zhalob grazhdanina Markina Konstantina gosudarstvennykh posobiakh grazhdanam, imeiushchim detei," statei 10 i 11 Federal'nogo zakona "O statuse voennosluzhashchikh," statei 32 Polozheniia o poriadke prokhozheniia voennoi sluzhby i pukntov 35 i 44 Polozheniia o naznachanii i vyplate gosudarstvennykh posobii grazhdanam, imeiushchim detei" ot 15 ianvaria 2009, No. 187-O-O, ¶2.1, [Ruling of the Russian Federation Constitutional Court of Jan. 15 2009, No. 187-O-O "On declining to review the complaint of Konstantin Aleksandrovich Markin regarding the violation of his constitutional rights according to the provisions set forth in article(s) 13 and 15 of the Federal Law 'On state aid to citizens with children,' article(s) 10 and 11 of the Federal Law 'On the status of military service members,' article 32 of the Regulations governing military service, and point(s) 35 and 44 of

the Regulations on the award and payment of state assistance to citizens with children"] available at <http://www.ksrf.ru/DECISION/Pages/default.aspx>

² *Id.* ¶ 2.2.

³ See Alexei Trochev, *All Appeals Lead to Strasbourg*, 17(2) *Demokratizatsiya* 145-178 (2009) (providing an overview on the enforcement of ECtHR judgments in Russia).

⁴ European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 (Russia ratified the Convention in 1998) available at: <http://conventions.coe.int/treaty/en/treaties/html/005.htm>.

⁵ *Id.*

⁶ Markin v. Russia, App. No. 30078/06, ¶ 48, ECtHR 2010.